



COLORADO
Division of Water Resources
Department of Natural Resources

September 7, 2018

Michael Erion, P.E.
Resource Engineering Inc.
909 Colorado Ave.
Glenwood Springs, CO 81601

Subject: **Emergency Substitute Water Supply Plan for Town of Carbondale**
Section 10, Township 9 South, Range 88 West, 6th PM
Water Division 5, Water District 38, Pitkin County

Approval Period: September 7, 2018 through December 7, 2018
Contact Phone Number for Mr. Erion: 970-945-6777

Dear Mr. Erion,

We have reviewed your letter received August 24, 2018 in which you request approval of an emergency Substitute Water Supply Plan (SWSP) for the Town of Carbondale (Applicant or the Town) pursuant to § 37-92-308(7), C.R.S. for a change in water right to allow the Town to use one (1) cfs of the East Mesa Ditch Priority 210A water right leased from the East Mesa Ditch Company, for municipal purposes within Town's service area. The \$300 fee (receipt number 3688104) has been received.

The Town's primary municipal water system is supplied by the Carbondale Water System and Pipeline and First Enlargement water rights, which divert from Nettle Creek, a tributary to the Crystal River. Water is treated at the Town's water treatment plant on Nettle Creek and piped down the Crystal River valley for municipal use in the Town's service area. On August 8, 2018, the Ella Ditch which is located downstream from Nettle Creek on the Crystal River placed a call which resulted in curtailment of the Town's water rights which are junior to the Ella Ditch. This has left some Town customers (41 taps) without a water supply and the Town without any backup to the Town's other water supplies. The Town does have wells adjacent to the Roaring Fork River that are currently being fully utilized but they do not produce enough for the Town's full demand. As a result, the Town has implemented water restrictions on its customers. The Town has ceased delivery of water from the Nettle Creek collection system to all but the 41 taps that can only be served by the Nettle Creek treatment plant.

Pursuant to § 37-92-308(7), C.R.S., emergency SWSPs may be approved if needed to address an emergency situation affecting public health or safety. Since the Town is



unable to supply water to a number of residential customers without a temporary change of water right, this approval is needed for the protection of the public health and safety of the Town's customers. Since this plan is an emergency, there are no requirements for notice to potential objectors and a 35-day comment period does not apply.

SWSP Operation

The East Mesa Ditch is located upstream of the confluence of Nettle Creek and the Crystal River. The East Mesa Ditch water right was adjudicated for irrigation purposes on December 12, 1902 for 31.8 cfs with priority number 210A and an appropriation date of August 9, 1894. This water right is senior to the Ella Ditch.

The East Mesa Water Company has agreed to loan the Town 1.0 cfs of their East Mesa Ditch Priority 210A water right pursuant to the attached Water Loan Agreement. The East Mesa Ditch will bypass the 1 cfs of its senior water right at its headgate and the Town will then divert a similar amount downstream by exchange at its South Nettle Collection System.

Approximately 630 acres are irrigated by the 31.8 cfs East Mesa Ditch Priority 210A water right. Approximately 380 acres or 60% of those acres are located within the northern region of the East Mesa irrigation system and the return flows from irrigation of these acres accrue to the Roaring Fork River and not to the Crystal River. The 1 cfs of loaned water was used to irrigate lands within this northern region therefore, the diversion of the loaned water is considered to be 100% consumptive to the Crystal River.

You indicated that representatives from the Town and from the Colorado Division of Water Resources have observed approximately 3.0 cfs of irrigation return flows accruing directly to the Roaring Fork River from irrigation of the northern region. Since the 1 cfs of loaned water was used to irrigate land within the northern region, the Town must replace a portion of the observed 3 cfs return flows accruing to the Roaring Fork. Based on the calculation that the loaned 1 cfs is 5.24% of the full water right (1cfs divided by 60 % of the irrigated land times the 31.8 cfs water right), you have estimated that the Town will be responsible for replacing 0.16 cfs or approximately 0.32 acre-feet per day of return flows to the Roaring Fork River. The Town will replace that portion of the return flows attributable to the loaned 1 cfs that will no longer be delivered to the irrigated lands under the East Mesa irrigation system with a portion of the Town's 500 acre-foot contract pool that it maintains in Ruedi Reservoir. The Town will request the release of this amount of water from its account in Ruedi Reservoir and will coordinate the amount and timing of such releases with the water commissioner or division engineer. The amount and timing of releases are subject to assessment and modification as determined by the division engineer.

Conditions of Approval

This SWSP is hereby approved pursuant to § 37-92-308(7), C.R.S., subject to the conditions stated below:

1. Pursuant to § 37-92-308(7), C.R.S., this SWSP is approved for the 91-day period of September 7, 2018 through December 7, 2018 for the change of water right of 1 cfs of the East Mesa Ditch Priority 210A water right from irrigation to municipal purposes

within the Town's water service area. Should an additional approval be required after this 91-day period, the provisions of § 37-92-308(4) or 308(5) shall apply unless the state engineer specifically allows a subsequent request pursuant to § 37-92-308(7), C.R.S. The statutory fee of \$300 will be required pursuant to § 37-92-308(8), C.R.S.

2. Approval of this SWSP is for the purposes stated herein and changes to water rights will be limited to the ditch and the portion of the water right identified in this approval. Additional uses of the East Mesa Ditch water right and/or changes to include additional portions of the East Mesa Ditch water right, or changes to include additional ditches will be allowed only if a new SWSP is approved for those additional uses/amounts/ditches. Should a new SWSP be requested, the provisions of § 37-92-308(4) or 308(5) shall apply unless the state engineer specifically allows a subsequent request pursuant to § 37-92-308(7), C.R.S. The statutory fee of \$300 will be required pursuant to C.R.S. § 37-92-308(8).
3. Approval of this SWSP does not in any way eliminate the obligation of the Applicant to comply with the by-laws that restrict use of any of the 1 cfs of the East Mesa Ditch identified in this SWSP. The use of any changed portion in this SWSP must be consistent with any applicable ditch and/or reservoir company by-laws.
4. Approval of this SWSP is contingent on the reduction of irrigation on the lands associated with the East Mesa Ditch water rights changed in this SWSP. The historically irrigated lands to be dried-up under this SWSP must be monumented and identified as required by the division engineer.
5. The Applicant shall provide daily accounting (including, but not limited to diversions, depletions, replacement sources, and river calls) on a monthly basis, or more frequent if required by the division engineer or water commissioner. The accounting must be emailed to the Division 5 Office (dnr_Div5acct@state.co.us, telephone 970-945-5665) and Water Commissioner, Jake.DeWolfe@state.co.us (telephone 970-355-4787). Accounting and reporting procedures are subject to approval and modification by the division engineer. Accounting forms need to identify the WDID number for each structure operating under this SWSP.
6. Prior to the operation of any exchange, the Applicant is required to notify the water commissioner and obtain the water commissioner's approval for the operation of the exchange at least 48 hours prior to operation, or less if allowed by the water commissioner. The applicant is required to obtain the water commissioner's approval on a daily basis or other interval as required by the water commissioner. The proposed exchange is limited to operating only at times there is a continuous live stream between the exchange from and exchange to points and at times sufficient exchange potential exists to operate the exchange without injury to other water users.
7. The name, address, and phone number of the contact person who will be responsible for the operation and accounting of this SWSP must be provided with the accounting forms to the division engineer and water commissioner.
8. The Applicant shall install and maintain measuring devices as required by the division engineer for operation of this SWSP.
9. Replacement water shall be made available to cover all return flow obligations in time, place, and amount and shall be made available under the direction and/or approval of the division engineer or water commissioner. Notice must be provided to,

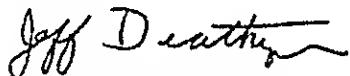
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and approval made by the water commissioner at least 48 hours prior to the release of replacement water, or as required by the water commissioner. The amount and timing of releases are subject to assessment and modification as determined by the division engineer.

10. The state engineer may revoke this SWSP or add additional restrictions to its operation if at any time the state engineer determines that injury to other vested water rights has occurred or will occur as a result of the operation of this SWSP. Should this SWSP expire without renewal, all use of water under this SWSP must cease immediately.
11. The decision of the state engineer shall have no precedential or evidentiary force, shall not create any presumptions, shift the burden of proof, or serve as a defense in any pending water court case or any other legal action that may be initiated concerning the SWSP. This decision shall not bind the state engineer to act in a similar manner in any other applications involving other SWSPs or in any proposed renewal of this SWSP, and shall not imply concurrence with any findings of fact or conclusions of law contained herein, or with the engineering methodologies used by the Applicant.

Should you have any questions or comments, please contact Megan Sullivan of this office or Alan Martellaro, Division Engineer, at 970-945-5665.

Sincerely,



Jeff Deatherage, P.E.
Chief of Water Supply

enc: Water Loan Agreement

ec: Alan Martellaro, Division Engineer
Jake DeWolfe, Water Commissioner District 38

WATER LOAN AGREEMENT

This Water Loan Agreement (hereinafter "Agreement") is entered and effective the 20th day of August 2018 between the East Mesa Water Company, a Colorado nonprofit corporation (hereinafter "Company") and the Town of Carbondale, Colorado, a Colorado municipal corporation (hereinafter "Town"). The Company and the Town are collectively referred to herein as the "Parties".

Recitals

Whereas, the Company owns water rights and related interests used to supply water to its shareholders, including without limitation a 31.8 c.f.s. direct flow irrigation water right in the East Mesa Ditch diverting from the Crystal River, decreed in Civil Action No. 990, District Court, Garfield County, with an adjudication date of December 12, 1902, and an appropriation date of August 10, 1894 (hereinafter "Priority No. 210A"); and

Whereas, the Town owns water rights and related interests used to supply water to its constituents, including without limitation water rights decreed to the Carbondale Water System and Pipeline and the First Enlargement thereto, both diverting from Nettle Creek and tributaries thereto, Priority Nos. 6AA and 794, as described in the Final Decrees in C.A. 2883 and 5884, Garfield County District Court, as well as the final decree in Case No. 88CW421, Water Division No. 5 (hereinafter "Carbondale Water System Priorities"); and

Whereas, an administrative call was placed on August 8, 2018 under water rights decreed to the Ella Ditch on the Crystal River, decreed in Civil Action No. 990, District Court, Garfield County, with an adjudication date of December 12, 1902, and an appropriation date of June 22, 1885 (hereinafter "Priority No. 127A"); and

Whereas, the administrative call placed under Priority No. 127A will require curtailment of diversions under the Carbondale Water System Priorities that are necessary for service by the Town to residential and other customers, but has not, at this time, required curtailment of diversions under the Company's Priority No. 210A; and

Whereas, water diverted into the East Mesa Ditch under Priority No. 210A is first applied to irrigation of lands located below the headgate of the Ella Ditch, and is thus fully depletive to the Crystal River to a point below the headgate of the Ella Ditch, and as such the Parties believe that a bypass of water under the Company's Priority No. 210A for the benefit of the Town may provide an effective means of increasing supply to the Ella Ditch and avoiding curtailment of the Carbondale Water System Priorities; and

Whereas, the Town has requested that the Company loan to, and permit the Town to use, up to 1.0 cfs of Priority No. 210A to avoid curtailment of the Carbondale Water System Priorities under the administrative call placed under Priority No. 127A; and

Whereas, the Company is willing to loan to the Town, and permit it to use, up to 1.0 cfs of Priority No. 210A pursuant to the terms of this Agreement;

Now therefore, the Parties agree as follows.

Agreement

1. Loan. The Company hereby loans to the Town up to 1.0 cfs of Priority No. 210A (hereinafter the "Loaned Water") subject to the terms of this Agreement and the Town's faithful performance hereunder.
2. Use of Loaned Water. The Town shall use the Loaned Water within a temporary substitute water supply plan to be approved by the Division of Water Resources under Colo. Rev. Stat. § 37-92-308 (7) to avoid or alleviate curtailment of the Carbondale Water System Priorities under the administrative call placed under Priority No. 127A (hereinafter the "Emergency TSSP"), and for no other purpose.
 - a. Emergency TSSP. The Town shall at its sole expense apply for and secure administrative approvals of the Emergency TSSP necessary for the Town to use the Loaned Water. The Town is not authorized to seek to utilize the Loaned Water through any other means, specifically including application to water courts in the State of Colorado.
 - i. The Town will not submit any application, communication or other document prepared in connection with the Emergency TSSP to the Colorado Division of Water Resources until the Company has had reasonable opportunity to review and approve the same. Under the uniquely exigent circumstances of this Agreement, reasonable opportunity shall mean a period of no less than eight consecutive (8) hours occurring between 9:00 a.m. and 6:00 p.m. on any weekday other than a recognized state or federal holiday.
 - ii. The Company will cooperate with the Town, at no additional expense to the Company and in a manner that does not impair the interests or rights of its shareholders, to expeditiously review and comment on any materials submitted for its review, to provide information to the Town as reasonably necessary for submission of the Emergency TSSP application, and to fulfill any administrative obligations that may be reasonably imposed by the Division of Water Resources in order to facilitate the implementation of the Emergency TSSP pursuant to this Agreement.
 - b. Delivery. The Company will deliver the Loaned Water to the Town as a bypass of 1.0 c.f.s. of water legally and physically available for diversion to the Company at the headgate of the East Mesa Ditch. The Town shall be solely responsible after this bypass for the legal and physical delivery and use of the Loaned Water and shall bear any carriage losses in such amount as is determined by the Colorado Division of Water Resources from the point of delivery to the point(s) of use and/or exchange or augmentation.

c. Ditch Modifications. The Company shall not be required to modify the East Mesa Ditch headgate or install new measurement or bypass equipment in connection with delivery of the Loaned Water, and the Town shall not modify the East Mesa Ditch headgate or install new measurement or bypass equipment in connection with delivery of the Loaned Water without the prior written consent of the Company.

d. Internal Ditch Operations. Notwithstanding any other provision of this Agreement, delivery of the Loaned Water to the Town shall not obligate the Company or any of its shareholders to modify operation or water use practices within the East Mesa Ditch below its headgate without the further consent of the Company or affected shareholders.

3. Term of Loan. The Loan shall become effective only upon approval of the Emergency TSSP by the Division of Water Resources, and will terminate in its entirety unless otherwise agreed between the Parties upon the earliest to occur of any of the following events: 1) the expiration of the Emergency TSSP; 2) the end of curtailment of the Carbondale Water System Priorities under the administrative call placed under Priority No. 127A; 3) the end of the 2018 irrigation season, being the date on which the Company ceases diversion through the East Mesa Ditch for delivery to shareholders as it determines; 4) at any time that the Company is unable to divert at least 25 c.f.s. under Priority No. 210A after allocation of 1.0 c.f.s. to the Town and the Company, in its sole discretion, does not agree to divert less than 25 c.f.s.; 5) breach of this Agreement; or, 6) December 31, 2018. The Company may also may terminate this Agreement if, in its discretion, any administrative proceeding initiated by the Town as contemplated in subparagraph 2.a above threaten the Company's water rights, or other interests associated with the East Mesa Ditch.

4. Shareholder Ratification. The Town acknowledges that the Company must obtain shareholder consent to this Agreement pursuant to its bylaws, and that, due to the uniquely exigent circumstances underlying the Town's request to the Company, shareholder consent has not been obtained at the time of execution. The Town desires that the Company enter this Agreement and thereafter seek shareholder consent, and the Company agrees to seek shareholder consent consistent with its bylaws within 72 hours after execution of the Agreement. The Town assumes all risk from, and holds the Company and its shareholders harmless for, any failure or inability of the Company to obtain shareholder consent to this Agreement.

5. No Recordation or Publication. The Parties agree this Agreement will not be recorded in any Clerk and Recorder's Office within or outside of Colorado. Although this Agreement shall be considered a public record that may be provided to the Colorado Division of Water Resources or others in connection with the Town's Emergency TSSP application, the Parties agree to use their best efforts, consistent with all legal and ethical obligations, to avoid publication or creation of other public records in connection with communications, preparation of documents, and other activities contemplated under this Agreement. And, although the Town shall not initiate public disclosure of any additional information related to this Agreement, the Town reserves the right to respond to any records request if the Town reasonably believes that such is required by the Colorado Open Records Act.

6. **No Agency Created and No Third-Party Beneficiaries.** This Agreement is not intended and shall not be construed to create any joint venture, agency relationship or partnership between the Parties. Neither of the Parties shall have any right or authority to act on behalf of or bind the other. The agreements herein and the benefits therefrom are solely intended for the Parties and are not for the benefit of, nor may they be claimed as benefits, by third parties, including shareholders and constituents of the Parties except as expressly provided herein.

7. **No Precedent.** This Agreement is the result of the Parties' effort to cooperatively resolve an exigent risk to human health and welfare confronting the Town. It is specifically understood and agreed by the Parties that this Agreement arises from the Company's good-will desire to assist the Town in this unique situation. Thus the existence of this Agreement and the components thereof shall never give rise to any argument, claim, defense or theory of acquiescence, waiver, bar, merger, stare decisis, res judicata, estoppel, laches or otherwise, nor to any administrative or judicial practice or precedent, by or against any of the Parties in any other agreement, matter, case or dispute, nor shall testimony concerning such agreement or acquiescence of the Company or Town to this Agreement and the components thereof be allowed in any other matter, case or dispute. The Parties agree they do not intend this Agreement and the components thereof to have the effect of precedent or preclusion on any factual or legal issue in any other matter.

8. **No Property Transfers.** The Parties agree no portion of this Agreement should be construed or interpreted as a transfer of title or a transfer of ownership of any water, water right or any facility for the supply, treatment and distribution of water owned by either of the Parties. Unless specifically set forth herein, neither of the Parties may assign their rights nor delegate their duties hereunder without the prior written consent of the other. Further neither of the Parties may sell nor sublease any benefits derived hereunder without the permission of the other, which permission each may grant or withhold at its discretion.

9. **Cost Reimbursement.** The Town shall timely reimburse the Company for all legal and engineering fees reasonably incurred by the Company in the negotiation of this Agreement and related to implementation of the Emergency TSSP. The Town has made an initial cash deposit with the Company in the amount of \$5,000 to secure its reimbursement obligations hereunder. The Company shall apply these funds to reimbursable invoices as they come in, with notice to the Town. The Town shall periodically and promptly replenish this deposit upon notice from the Company that the fund balance has dropped below \$1,000.00. Any funds remaining at the termination of the Loan term shall be returned to the Town. Upon request by the Town, the Company shall provide the Town with a summary of all reimbursable expenses incurred by the Company pursuant to this Paragraph 9.

10. **Liability/Indemnification/Governmental Immunity.** To extent allowed by Colorado law, the Town agrees to indemnify and hold the Company harmless from and against any penalties, losses, damages, claims, demands, injuries, expenses, costs or liabilities of any kind or nature (including, but not limited to, actual damages, court costs, attorneys' fees) incurred by the Company in any way arising out of or resulting from the Company's entry into this Agreement, other than any loss to the Company or its shareholders that would reasonably be anticipated to result to the Company or its shareholders as a result of the Company's agreement to forego diversion of up to 1.0 c.f.s. of water for the benefit of the Town pursuant to the terms of this

Agreement. Notwithstanding the foregoing, the Town shall have no responsibility or liability for operation or maintenance of the East Mesa Ditch system, and nothing in this Agreement herein shall be interpreted as a waiver of governmental immunity, to which the Town would otherwise be entitled under § 24-10-101, et seq., C.R.S., as amended. This contract is also contingent upon annual budgeting by the Town of Carbondale and nothing in this contract shall be construed as a multi-year financial obligation of the Town.

11. Force Majeure. The Company shall not be responsible for any losses or damages incurred as a result of its inability to perform pursuant to this Agreement due to the following causes if beyond the Company's control and when occurring through no direct or indirect fault of the Company, including without limitation: acts of God; natural disasters; actions or failure to act by governmental authorities; unavailability of supplies or equipment critical to the Company's ability to perform; major equipment or facility breakdown; and changes in Colorado or federal law, including, without limitation, changes in any permit requirements.

12. Specific Performance. The Parties hereto are entitled to seek the remedy of specific performance regarding any breaches hereof by the other.

13. Notice. Except as to any operational communications that the Parties may subsequently agree are best handled through electronic or telephonic means, all notices, requests, demands or other communications (collectively, "Notices") hereunder shall be in writing and given by (i) established express delivery service which maintains delivery records requiring a signed receipt, (ii) hand delivery or (iii) certified or registered mail, postage prepaid, return receipt requested to the Parties at the following address, or at such other address as the Parties may designate by Notice in the above manner.

To Town: Town of Carbondale
 Attn: Jay Harrington, Town Manager
 501 Colorado Avenue
 Carbondale, CO 81623

with copy to: Mark Hamilton, Esq.
 Holland & Hart LLP
 600 E. Main St, Suite 104
 Aspen, CO 81611

To Company: East Mesa Water Company
 1625 Prince Creek Road
 Carbondale, CO 81623

with copy to: Balcomb & Green, P.C.
 P.O. Drawer 790
 Glenwood Springs, CO 81602

Attn: Christopher L. Geiger, Esq.

Notices shall be effective (i) the day of delivery indicated by the delivery receipt when sent by an established express delivery service which maintains delivery records requiring a signed receipt, (ii) upon receipt by the addressee of a hand delivery, or (iii) the day of delivery indicated by the Return Receipt when mailed via Certified or Registered mail, postage prepaid, Return Receipt Requested.

14. No Other Agreement or Decree Modified. Unless specifically identified and referenced in this Agreement no other agreement or contract between the Parties or between either of them and a third party, or any water decree or stipulation is modified or changed by this Agreement.

15. Default. Failure to perform any obligation contained in this Agreement by any Party shall constitute a default. A party may seek legal or equitable recourse in any court of competent jurisdiction including suspension of the terms of this Agreement. Failure to enforce any default shall not be construed as a waiver by a party of the default or remedies for breach.

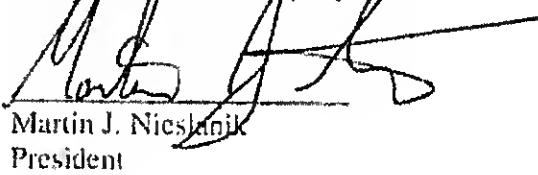
Executed this 22nd day of August, 2018.

Town of Carbondale



Jay Harrington
Town Manager

East Mesa Water Company



Martin J. Nieslonyk
President